

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 61549-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
ADAM JAMES WINNINGHAM,)	
)	FILED: May 11, 2009
Appellant.)	
_____)	

AGID, J.—Adam Winningham appeals his conviction for residential burglary, contending that the evidence was insufficient to establish that he entered or remained unlawfully in the residence. He also contends that the trial court erred by calculating his offender score based on a finding that his prior convictions for first degree burglary and first degree robbery were not the same criminal conduct. Because there was sufficient circumstantial evidence from which a rational jury could find that Winningham entered unlawfully in the residence and the record supports the trial court’s finding that he had different criminal intents for the prior burglary and robbery convictions, we affirm.

FACTS

Late in the afternoon on December 19, 2007, Lisa Ryan was in her backyard when she heard her dog bark. She then saw two men walk down the sidewalk by her driveway and into the driveway of her neighbor, Henry Drew. She saw one of the men she later identified as Winningham, walk toward the front door of Drew's house, while the other man went toward the back door and motioned for Winningham to follow. Ryan then went to the end of her driveway to look at Drew's house and saw that Drew's car was not there. She also noticed that there were no lights on in the house and that the blinds were closed, but "got the impression" of movement inside the house and later heard a door close.

After about 10 minutes, she saw Winningham appear from the side of the house, but duck back behind the house when he saw her. Ryan saw him carrying a heavy duffle bag. She did not see the other man nor did she see either man leave Drew's property.

Ryan then went home and called the police. The police arrived shortly after and began searching Drew's house and the surrounding area with flashlights. They did not find anyone inside or outside the home. A police dog followed a scent but did not locate a suspect.

Drew's house appeared ransacked, and the police officers believed that someone had entered the home through a back bedroom window that was unlocked, had the window screen removed, and had bent blinds. The side door was also unlocked. Fingerprints were found in the living room, but none matched Winningham. A police sergeant responding to the call saw Winningham walking down the street and

detained him based on Ryan's description. A detective brought Ryan to the sergeant, and she identified Winningham as the man she saw outside of Drew's house.

The next day, a neighbor reported to police that his family found a duffle bag under some trees on his property. Drew identified the duffle bag and its contents, including a laptop computer, as his property. Police obtained fingerprints from the duffle bag, but they did not match Winningham's.

The State charged Winningham with residential burglary, and a jury found him guilty as charged. Winningham then moved to set aside the verdict, arguing that there was insufficient evidence that he actually entered the house. The court denied the motion, finding:

There is a reasonable inference based on the evidence in this matter that one person entered through a window . . . and that the sound of the door closing was the person who had gone in through the window letting the other person into the house.

The court further found that the evidence supported an inference that when the neighbor saw Winningham the second time carrying the duffle bag, Winningham had the contents of the house that he just burglarized. From these facts, the court concluded that a reasonable fact finder was entitled to draw the inference that Winningham had in fact entered the home.

At sentencing, Winningham challenged his offender score, contending that his prior convictions for first degree burglary and first degree robbery constituted the same criminal conduct. The court concluded that they did not encompass the same criminal conduct and counted each crime separately in his offender score. The court sentenced him to 43 months' confinement, a sentence within the standard range.

DISCUSSION

I. Sufficiency of the Evidence

Winningham asserts that because the trial court did not give an accomplice instruction, the jury was required to find beyond a reasonable doubt that he entered or remained unlawfully in Drew's house with intent to commit a crime. He contends that none of the evidence proves that he went into Drew's home and was therefore insufficient to support the jury's verdict that he was guilty of residential burglary. We disagree.

When reviewing a challenge to the sufficiency of the evidence, we must determine, considering the evidence in the light most favorable to the prosecution, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."¹ We assume the truth of the prosecution's evidence and all inferences that the trier of fact could reasonably draw from it.² We defer to the trier of fact to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses.³ Circumstantial evidence is as probative as direct evidence.⁴

"A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling

¹ State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

² State v. Wilson, 71 Wn. App. 880, 891, 863 P.2d 116 (1993), rev'd in part on other grounds, 125 Wn.2d 212, 883 P.2d 320 (1994).

³ State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998).

⁴ State v. Vermillion, 66 Wn. App. 332, 342, 832 P.2d 95 (1992), review denied, 120 Wn.2d 1030 (1993).

other than a vehicle.”⁵ Proof that the defendant possessed recently stolen property accompanied by additional evidence such as the defendant’s flight or presence near the burglary scene will support a burglary conviction.⁶ “A trier of fact may rely exclusively upon circumstantial evidence to support its decision.”⁷

Here, there was sufficient circumstantial evidence that Winningham entered or remained unlawfully in Drew’s house. The neighbor saw him walk around the back of the house, saw movement inside the house, and then heard a door close. Shortly after, she saw Winningham walk around the corner of the house with a bag containing items stolen from the house. Police also discovered an unlocked window that had the screen removed and bent blinds, and an unlocked side door. A rational jury could infer from these facts that Winningham entered the house through the window and left through the side door. That he was also seen at the burglarized house carrying a duffle bag that contained the stolen items is sufficient to support the jury’s finding that he was the burglar.⁸ Winningham’s arguments that the evidence suggested that the other person entered the house ignores the standard we must apply to challenges to the sufficiency of the evidence. When viewed in the light most favorable to the prosecution, Ryan’s testimony that she saw Winningham at the back of the house, heard a door close, and lost sight of him for a period of time was sufficient circumstantial evidence from which the jury could find that he entered the home.

⁵ RCW 9A.52.025(1).

⁶ State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982).

⁷ State v. Jackson, 145 Wn. App. 814, 818, 187 P.3d 321 (2008).

⁸ See Mace, 97 Wn.2d at 843.

II. Same Criminal Conduct

Winningham next contends that the trial court erred by finding that his two prior convictions for first degree robbery and first degree burglary did not constitute the same criminal conduct and counting them as separate offenses in his offender score. We disagree.

For purposes of calculating a defendant's offender score under the Sentencing Reform Act, chapter 9.94A RCW, two or more current offenses are presumed to count separately unless they encompass the "same criminal conduct." Crimes encompass the same criminal conduct only if they (1) require the same objective criminal intent, (2) are committed at the same time and place, and (3) involve the same victim.⁹ We construe narrowly the statute defining "same criminal conduct" to disallow most assertions of same criminal conduct.¹⁰

If a court has previously determined that prior offenses encompass the same criminal conduct, the current sentencing court must count them as one offense.¹¹ Otherwise, the sentencing court uses the same criminal conduct analysis to determine whether other prior adult offenses that carried concurrent sentences should be counted as one offense or separate offenses.¹² We will reverse a sentencing court's "same criminal conduct" ruling only for a clear abuse of discretion or misapplication of the law.¹³

⁹ RCW 9.94A.589(1)(a); State v. Lopez, 142 Wn. App. 341, 351, 174 P.3d 1216 (2007), review denied, 164 Wn.2d 1012 (2008).

¹⁰ State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007) (quoting State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994)).

¹¹ RCW 9.94A.525(5)(a)(i).

¹² RCW 9.94A.525(5)(a)(i).

¹³ State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990).

Here, the trial court found that Winningham's prior convictions did not constitute the same criminal conduct because one crime was completed before the other was committed. Winningham entered guilty pleas on first degree burglary and robbery charges, and the court based its finding on the Certification of Probable Cause (Certification), which described the incident from which both charges arose. According to the Certification, Winningham entered the victim's apartment through a window when the victim did not answer his door. Once inside, Winningham argued with the victim and began punching him, breaking his jaw, and knocking him to the ground. Another person entered the room and saw the victim curled up on the floor bleeding with Winningham standing over him with clenched fists. Winningham then grabbed the victim's cell phone from the counter and fled.

Winningham asserts that both the burglary and the robbery "were part of an overall plan to obtain property by the use of force" and therefore encompassed the same criminal conduct. We disagree. While the assault may have permitted Winningham to commit the robbery, the facts do not show that he assaulted the victim for that purpose. Thus, the record supports the trial court's finding that the crimes did not contain the same criminal intent and do not encompass the same criminal conduct.

To determine whether two crimes involve the same criminal intent, the court must examine and compare each statute to determine whether the required intents are the same or different for each crime.¹⁴ If the statutory intent is different, the crimes are counted separately.¹⁵ If the statutory intent is the same, the court looks to the facts to

¹⁴ Wilson, 136 Wn. App. at 613.

¹⁵ State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, review denied, 118 Wn.2d 1006 (1991).

determine if the defendant's intent is the same for both crimes.¹⁶

Here, the criminal intent for burglary is the intent to commit a crime against a person or property inside a building in which the defendant unlawfully entered or remained.¹⁷ Robbery does not have a statutory intent element, but our courts have held that the intent to steal is an essential element of the crime.¹⁸ Thus, if the crime intended to be committed in a burglary is theft, it could share the same intent element of robbery. We therefore examine the facts to determine whether Winningham's intent was the same for both crimes.

"Two crimes do not contain the same criminal intent when the defendant's intent objectively changes from one crime to the other."¹⁹ The same objective intent may be found when one crime furthered the other or both crimes were part of a recognizable scheme or plan.²⁰

But where the second crime is "accompanied by a new objective 'intent,'" one crime can be said to have been completed before the commencement of the second; therefore, the two crimes involved different criminal intents and they do not constitute the same criminal conduct.^[21]

Here, as the trial court found and the record indicates, the intent of the burglary was not to steal the phone, but to assault the victim. According to the Certification, Winningham told police that the reason he broke into the apartment was because the victim did not answer the door and the reason he assaulted the victim was because he lost his temper. The facts described in the Certification also support the conclusion

¹⁶ Id.

¹⁷ RCW 9A.52.020.

¹⁸ State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

¹⁹ Wilson, 136 Wn. App. at 613.

²⁰ Id.

²¹ Id.

that his intent to steal the phone was formed after he broke into the apartment and assaulted the victim: he did not take the phone until after he completed the assault and the other person came in the room. Thus, the record supports a finding that the robbery was “accompanied by a new objective intent” to steal the phone once he decided flee and the victim was rendered defenseless. The trial court did not abuse its discretion by concluding that the crimes do not constitute the same criminal conduct.²²

Winningham also contends that the trial court erred because it improperly relied on a previous determination by another court that the crimes did not encompass the same criminal conduct and on a prior plea agreement in which he agreed to the offender score computation which scored each conviction separately. Winningham is correct that the sentencing court must make an independent determination on a same criminal conduct claim when there has been no previous determination that the crimes encompassed the same criminal conduct.²³ Here, in making its ruling, the trial court found that the sentencing court “certainly treated these cases as not being the same criminal conduct” and that “the defendant acknowledged, with advice of competent counsel, that they were not the same criminal conduct, and they should be scored separately.” But as discussed above, the court ultimately concluded based on the facts in the record that the crimes did not constitute the same criminal conduct because the burglary was completed after the assault but before the robbery. Thus, the court

²² We also note, as the State points out, that under the antimerger statute, the sentencing court has discretion to punish separately a burglary and any crime committed during the burglary. RCW 9A.52.050; State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).

²³ State v. Reinhart, 77 Wn. App. 454, 459, 891 P.2d 735, review denied, 127 Wn.2d 1014 (1995).

properly made an independent determination that the offenses did not encompass the same criminal conduct.

We affirm.

Ajid, J.

WE CONCUR:

Cox, J.

Grosse, J